

Administrative Review Boards at Guantanamo

Purpose

The Administrative Review Board (ARB) assesses annually whether each enemy combatant (EC) at Guantanamo continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention (i.e., intelligence value and any law enforcement interest in the detainee). The ARB then makes a recommendation to the Designated Civilian Official (DCO – currently Deputy Secretary of Defense) on whether the EC should be released, transferred, or further detained by the United States.

History and Background

The law of war has long recognized the right to detain enemy combatants until the cessation of hostilities. To address some unique and unprecedented characteristics of the Global War on Terrorism, and because the United States does not want to detain ECs any longer than necessary, the Department of Defense (DoD) has, on an ongoing basis, reviewed the continued detention of each enemy combatant to determine whether the EC can leave Guantanamo while hostilities remain ongoing. This action is unprecedented during a time of active armed conflict.

When it believes an EC no longer continues to pose a threat to the United States and its allies, the United States will transfer the EC to his home government with the understanding that, from the United States' perspective, he may be released. Furthermore, the United States will transfer other ECs to the custody of their home governments when those governments are prepared to take the steps necessary to ensure that the person will not pose a continuing threat to the United States or its allies, including investigation or prosecution of the person by the home government under its laws, as appropriate. The United States may also transfer a detainee to a country other than the country of the detainee's nationality, when the country requests transfer for purposes of criminal prosecution or when transfer to the detainee's home country is otherwise not feasible.

The ARB process was created by order of the Deputy Secretary of Defense in May 2004,¹ replacing the previous EC review process. Implementing regulations were promulgated in September 2004 and were then revised in July 2006.² The Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) is responsible for administering this process.

The first round of ARB reviews was conducted in 2005. A total of 463 detainees were evaluated during that process, resulting in DCO decisions to release 14 detainees, transfer 119 detainees, and continue the detention of 330 detainees.³

The second round of ARB reviews was conducted in 2006. A total of 328 detainees were evaluated during that process, resulting in DCO decisions to transfer 55 detainees and continue the detention of 273 detainees.⁴

¹ Available at <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf>

² Available at <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>.

³ See <http://www.defenselink.mil/news/Jan2006/d20060130arb.pdf>.

⁴ See <http://www.defenselink.mil/news/arb2.pdf>.

Process

ARB hearings are thorough and methodical. They involve a rigorous evaluation of all relevant and reasonably available information in the USG's possession regarding each EC.⁵ The ARB panels make recommendations to the DCO on whether ECs should be released, transferred, or continued in detention.

At least 30 days prior to a detainee's ARB hearing, the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) solicits input regarding the detainee from other U. S. Government agencies, including the Departments of State and Justice and the Central Intelligence Agency, in order to assist the ARB panel in making its recommendation. Through the Department of State, the EC's family and home government are also invited to provide input.

Each EC is assigned an Assisting Military Officer (AMO) who meets with the EC, explains the ARB process to him, and provides him with an unclassified written summary of the primary factors to be considered by the ARB, including any factors favoring his continued detention and any favoring his release/transfer from Guantanamo. The AMO may assist in the process of obtaining information that the EC desires to be considered by the board. The EC is also given the opportunity to appear personally before the ARB to present information relevant to his continued detention, transfer, or release.

Another military officer is assigned as the Designated Military Officer (DMO) and is responsible for presenting to the ARB all relevant and reasonably available information in the possession of DoD and information provided by other agencies. The DMO presents classified and unclassified summaries of information to the ARB panel for consideration in their deliberations.

Each ARB panel consists of three commissioned military officers. The presiding officer of the panel is a senior officer in the grade of O-6, and at least one member of each panel must have an intelligence background.

Following its review, the ARB panel makes a written assessment on the extent to which the EC continues to pose a threat to the United States or its allies, and whether there are other factors bearing upon the need for continued detention (e.g., intelligence value, law enforcement interest). The panel then makes one of three recommendations: (1) Release the EC; (2) Transfer the EC to the custody of his home nation (or in some cases, to a third country); or (3) Continue to detain the EC in U.S. custody. The recommendation is determined by majority vote, and a dissenting opinion (if any) is included in the final report.

After a legal sufficiency review of the file is conducted, the ARB record is provided to the DCO, who is responsible for making the final decision whether to release, transfer, or continue to detain the detainee. If the final decision is either to release or transfer the detainee, the Department of State will assist in implementing that decision. If the decision is to continue to detain, the EC's continued detention will be reviewed annually by an ARB.

⁵ ECs who were approved for transfer/release through the previous process or who have been formally designated as Military Commission cases are not eligible for an ARB.